IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1490 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DHIRENDRAKUMAR A BHATT

Versus

BUILDWELL CONSTRUCTION CO

Appearance:

MR TH SOMPURA for Petitioner

MR VC DESAI for Respondent No. 1

MR JD AJMERA for Respondent No. 3

MR SURESH M SHAH for Respondent No. 5

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 09/02/2001

ORAL JUDGEMENT

The appellant (Original defendant no. 3) in this appeal has challenged the judgment and decree dated 16.12.1978 passed against him by the learned City Civil

Judge, Ahmedabad in Civil Suit No. 1500/1974. As per the said decree, the plaintiff to recover Rs. 9000/ with 6% interest from the date of suit from defendant no. 3 till recovery with costs.

The facts of the case as stated in the plaint are stated as under:

The plaintiff no. 2 was a partnership firm registered under the Indian Partnership Act which was dissolved on 31.8.1971 and plaintiff no. 1 has become the sole owner of the right title and interest of the firm. He alone is entitled to file the present suit, but with a view to avoid any disputes plaintiff no. 2 is also joined. The defendant no. 2 is the partner or owner of defendant no. 1 firm and is practising as advocate in Ahmedabad. The defendant no. 3 is also practising as advocate at Bhavnagar and also organiser of defendant no. 4 - society.

At the time of suit transaction, the defendant no. 3 was Secretary of defendant no. 4- Co-operative Housing Society registered under the Gujarat Co-operative Societies Act. The defendant no. 3 on behalf of defendant no. 4 entered into certain contracts with the plaintiff. The plaintiff was to construct about 22 tenaments and the price with land was fixed. Out of the said price, the first instalment of Rs. 81,241/ was to be paid by the members of the society. Out the said amount, the plaintiff was to purchase and pay for the land. The second instalment of Rs. 70,000/ was to be paid on completion of the work of the blocks upto the plinth level and the third and subsequent installments were to be paid progressively thereafter. As per the agreement dated 10.12.1970, the members of the society paid certain amounts to the plaintiff out of which the plaintiff paid Rs. 39,991/ towards the land. As the society could not pay the second instalment of Rs. 70,000/, even though the plaintiff completed work upto the plinth level on 25.3.1971, the office bearers of defendant no. 4 informed the plaintiff that the society had applied for a loan from Gujarat State Financial Corporation and on getting the loan, the second instalment would be paid. The plaintiff continued construction work of defendant no. 4-society. While continuing his demand for second instalment, at that time, the defendant no. 3 told the plaintiff that the defendants no.1 and 2 have wide influence in Ahmedabad and would get the loan sanctioned for the society. In order to get the work done, an amount of Rs. 3000/ should be initially paid them. The plaintiff in order to

see that his dues of second installments are paid, the plaintiff got a draft of Rs. 3000/ issued in the name of defendant no. 1 and gave it to defendant no. 3. The defendant no. 2 has collected the draft by crediting it in his own account. The amount of the draft has been debited in the 'khata' of defendant no. 1 in plaintiff's account books. Thereafter, the defendant no. 3 required Rs. 6000/ more for purchase of necessary stamps, share contribution, etc. in order to get the loan. If such amount is spent, the loan is likely to be sanctioned within one month. The plaintiff, therefore, again gave Rs. 6000/ in cash to defendant no. 3 for payment to defendant no. 1. This amount was paid in the following manner, namely; that the plaintiff was entitled to collect amounts from the share holders or plot holders of the society. It was agreed that the plaintiff will collect Rs. 6844/ from one Nandlal Harjivandas. The defendant no. 3 with the consent of plaintiff collected that amount and retained it with him. So, out of that amount the plaintiff agreed that an amount of Rs. 6000/ be paid by defendant no. 3. It was agreed that as soon as the loan amounts is received, the same shall be paid to the plaintiff. The defendant no. 3 also gave a statement in respect of the amount of Rs. 6844/ to the plaintiff and, the plaintiff accordingly made necessary entries in his account books. The plaintiff, therefore, has claimed Rs. 9000/ from defendant no. 1 as paid through defendant no. 3. The plaintiff has filed another suit against defendant no. 4 for the construction work, interest, damages, etc. in Bhavnagar court.

The defendants no. 1 and 2 in their written statement, ex. 38, denied the averments of the plaintiff. The defendants have admitted that they have received a draft of Rs. 3000/ on 12.5.1971 not from the plaintiff, but from defendant no. 4-society. Similarly, the defendants have admitted to have received Rs. 3000/ and more on 12.5.76 from the defendant no. 4-society. Both the amounts have been duly credited in his account books. However, defendants have denied to have received Rs. 6000/ besides Rs.3000/. It is specifically pleaded that there is no privity of contract with the plaintiff, and therefore, contended that the suit for the damage is not maintainable. The defendant no. 2 after relying upon the correspondence between him and the society and his own account books, has stated that he has received draft of Rs. 3000/ dated 12.5.1971, Rs. 3000/ in cash on 7.8.1971 and besides this, no other amount was received by him.

The defendant no. 4 filed its written statement, ex. 34, and also denied the averments of the plaintiff by contending that the court has no jurisdiction as the defendant no. 4 is the society registered under the Gujarat Co-operative Societies Act, and the plaintiff has not served any notice under sec. 167 of the Gujarat Co-operative Societies Act. In absence of such a notice, the suit is prima-facie not maintainable against defendant no. 4. The said defendant no. 4 has admitted that the defendant no. 3 was the main promoter of defendant no. 4-society, but he was not authorised as a Secretary to carry on transactions with the plaintiff, and therefore, the society is not bound by the unauthorised transaction of defendant no. 3 with the plaintiff. In substance, it was contended that no cause of action thus arisen against the defendant no. 4 and, therefore, the suit be dismissed.

The defendant no. 3 in his defence has filed affidavit at ex. 15, for leave to defend. The said affidavit has been adopted as a written statement by filing purshis dated 13.3.1975. It is, inter alia, contended by him that the suit is barred by limitation as well as bad for want of jurisdiction as all the agreements were made at Bhavnagar, this court has no jurisdiction. The said defendant further contended that he did not tell plaintiff to pay Rs.3000/ to defendant no. 1 for getting the loan sanctioned and has not promised that the amount should be repaid from the loan. In substance, the averments of the plaintiff with regard to the money transactions have been disputed by the said defendant.

The learned trial judge after framing necessary issues recorded a finding that the plaintiff gave draft drawn in favour of defendant no. 1 for Rs. 3000/ to defendant no. 3 on May 18, 1971 and defendant no. 3 gave Rs. 6000/ in cash to defendant no. 1 on behalf of the plaintiff on June 7, 1971, on a representation by defendant no. 3 that defendants no. 1 & 2 would manage for getting the loan from Gujarat Housing Finance Corporation. As far as the question of jurisdiction is concerned, the trial court held that it has jurisdiction to entertain the suit and the suit is bad for want of statutory notice only against defendant no. 4-society. The Court has also recorded a finding that the plaintiff has a right to file the present suit. In view of this finding, the learned trial judge passed the decree for the amount of Rs. 9000/ with 6% interest against the defendant no. 3. Hence, the present appeal.

Mr. TH Sompura, learned advocate appearing for the appellant has challenged the said judgment and decree passed by the trial court by contending that the trial court committed an error in holding that it has jurisdiction to entertain the suit. He, further submitted that the suit in the present form against the appellant is not maintainable in view of the provisions of Sec. 167 of the Gujarat Co-operative Societies Act, as the appellant in the capacity as the Secretary of the society, borrowed the amount from the plaintiff. Mr. Sompura also challenged the finding recorded by the trial court on the merits of the case.

Mr. VC Desai learned advocate appearing for the respondents no. 1 and 2 (Original plaintiffs) supported the judgment of the trial court in toto.

I have gone through the pleadings as well as the evidence recorded in the case. The plaintiff has examined Narandas Popatlal Patel, ex. 46, the partner of respondent no. 1 firm. On behalf of respondents no. 1 and 2 (Original defendants no. 1 & 2) Abdul Sattar Ahmed Lakhani has been examined vide ex. 70. The defendants no. 3 & 4 have not entered the witness box. As far as the question of jurisdiction is concerned, the learned trial judge was of the opinion that since the defendants no. 1 & 2 reside and carry on business at Ahmedabad and, therefore, under Sec. 20 of the Code of Civil Procedure, the plaintiff is entitled to file the suit at Ahmedabad. True, as per the provision of sec. 20(c), the court will have jurisdiction where the cause of action, wholly or in part, arises within the local limits of the jurisdiction of a particular court. But as far as the facts of the present case are concerned, admittedly, there is no cause of action against the defendants no. 3 and 4 in Ahmedabad. Admittedly, defendants no. 3 and 4 are residing at Bhavnagar, where the plaintiffs were required to carry out the work of construction. It is also not in dispute that the plaintiff gave draft of Rs. 3000/ to defendant no. 3 at Bhavnagar to be paid to defendant no. 1 for the work of the society at Ahmedabad. Similarly, the amount of Rs. 6000/ was allowed to be retained with defendant no. 3 for being paid to defendants no. 1 & 2 also for the work of the society. This fact is corroborated even from the entries of account books of plaintiffs. Even as per the finding recorded by the learned trial judge, there was no privity of contract between the plaintiffs and defendant no. 3. Merely because the defendants no. 1 and 2 encashed the draft of

Rs. 3000/ at Ahmedabad, it cannot be contended that part of cause of action had arisen at Ahmedabad and, therefore, the court at Ahmedabad will have jurisdiction. In my opinion, the learned trial judge has misdirected himself by recording a finding that it has jurisdiction to decide the suit.

Even apart from the question of jurisdiction, the suit in the present form against the defendant no. 3 is not maintainable in view of the provisions of sec. 167 of the Gujarat Co-operative Societies Act which provides that "save as otherwise provided in this Act no suit shall be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office stating the cause of action, the name, description etc. of the plaintiff and the relief claimed." The section also enjoins the plaintiff to make a statement in the plaint that such notice has been so delivered or left. In the instant case, the plaint does not contain any such averment. The defendant no. 3, even as per the evidence of the plaintiff, was the promoter of the proposed society i.e. defendant no. 4 and in that capacity obtained "Banakhat" of the land in the name of proposed society. It is further the evidence of the plaintiff that defendant no. 3 was the secretary of the society and on behalf of defendant no. 4 has borrowed the amount of loan to be received from the Gujarat Housing Finance Corporation for the purpose of continuing the construction work. Thus, all the transactions between the plaintiffs and the defendant no. 3 were carried out for the work of defendant no. 4-society. The defendant no. 4 though stated in the written statement that the defendant no. 3 was not authorised to act on behalf of the defendant no. 4-society, however, nobody from the defendant no. 4 have entered the witness box and, therefore, the plaintiffs' evidence is required to be accepted. Admittedly, the plaintiffs parted with Rs. 9000/ on two occasions and it was with a view to see that the society's application for loan is followed and loan is expeditiously granted to it. Hence, the amount paid by the plaintiffs to defendant no. 3 certainly relates or touches the business of the society and as such in absence of any statutory notice provided under sec. 167 of the Act, the suit is bad against defendant no. 3, and consequently, the decree of Rs.9000/ passed against the defendant no. 3 is also liable to be quashed and set aside.

In view of the aforesaid findings on the question

of jurisdiction and maintainability of the suit, it is not necessary to go into the question of the merits of the case.

In the result, this appeal is allowed. The judgment and decree dated 16.12.1978 passed against the defendant no. 3 by the learned Trial Judge in Civil Suit No. 1500/1974 is quashed and set aside. In view of the facts and circumstances of the case, there will be no order as to costs. The parties shall bear their own cost.

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